ARKANSAS SUPREME COURT

No. CR 05-812

NOT DESIGNATED FOR PUBLICATION

ROBERT CHARLES OLIVER
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered **May 4, 2006**

PRO SE APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, CR 97-624, HON. BARRY ALAN SIMS, JUDGE

AFFIRMED

PER CURIAM

A judgment and commitment order entered on August 28, 1997, reflects that a jury found appellant Robert Charles Oliver guilty of robbery, kidnapping, residential burglary, and theft of property. An amended order entered October 17, 1997, shows convictions on those charges and additional negotiated guilty pleas on charges of attempted robbery and attempted residential burglary. Both orders reflect an aggregate sentence of 1200 months' imprisonment in the Arkansas Department of Correction. Appellant appealed the robbery, kidnapping, residential burglary and theft charges, and the Arkansas Court of Appeals affirmed the judgment. *Oliver v. State*, CACR 98-368 (Ark. App. December 16, 1998).

In 2002, appellant filed a *pro se* petition for writ of *habeas corpus* under Act 1780 of 2001, which was denied. This court affirmed the denial, noting that appellant's claims that the prosecution withheld evidence were not within the ambit of Act 1780. *Oliver v. State*, CR 02-823 (Ark. June 19, 2003) (*per curiam*). In 2004, appellant filed a motion to set aside the judgment that was denied.

Appellant appealed that order to this court, but the appeal was dismissed because the motion filed was, although not so labeled, a petition under Ark. R. Crim. P. 37.1 collaterally attacking the verdict, and not timely filed. *Oliver v. State*, CR 04-1077 (Ark. January 20, 2005) (*per curiam*).

On May 9, 2005, appellant filed a *pro se* petition to vacate and set aside judgment on the robbery, burglary, kidnapping and theft charges that requested testing pursuant to Act 1780. Appellant asked that certain items of evidence be further tested for fingerprint identification, asserting that latent prints on those items that were not previously identified should be submitted to the Automated Fingerprint Identification System ("AFIS") database. The trial court denied the petition "with prejudice to refilling of another petition to vacate or petition to set aside judgment." Appellant now brings this appeal of that order.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

The trial court's order references a previous petition to vacate and set aside judgment and affirmance of the denial of relief, which, although not specifically identified, was apparently the 2004 motion that this court deemed to be a Rule 37.1 petition. The order states that the relief requested was the same. The ultimate relief requested in any postconviction proceeding will generally be a challenge to the conviction, whether direct or collateral. But, the remedy requested here was relief under Act 1780. Appellant has previously filed a request for Act 1780 testing, but the Act does not limit the number of requests that may be filed for testing. A petitioner, however,

may not file more that a single petition for relief under Rule 37.1, as Ark. R. Crim. P. 37.2(b) requires that all grounds must be raised in the original petition unless the petition was denied without prejudice. Appellant has requested testing under Act 1780, not Rule 37.1, and the fact that the ultimate relief that he requests is the same as the relief requested in a previously filed petition does not foreclose his access to the Act.

We affirm the trial court, however, because appellant did not provide a claim in his petition that would qualify for relief under Act 1780. Appellant requested testing of items taken from the victim's home so as to identify the source of fingerprints found on those items. Appellant asserts in his reply brief that, at trial, the fingerprints were established not to be appellant's. Police Officer Jeff Norman's testimony actually established that the prints taken were not adequate in order to make any match, rather than that the testing conducted excluded anyone. In either case, appellant has not established either that, were the source of the fingerprints identified, the identification of the source would be materially relevant evidence that would significantly advance his claim of innocence, or that the prints can now be matched if submitted to the database.

Under Act 1780, testing is not authorized based on the slight chance it may yield a favorable result, and scientific testing of evidence is authorized only if testing or retesting can provide materially relevant evidence that will significantly advance the defendant's claim of innocence, in light of all the evidence presented. *See Johnson v. State*, 356 Ark. 534, 157 S.W.3d 151 (2004). Under the act as in effect when appellant filed his petition, a number of predicate requirements must be met before a circuit court can order that testing be done. *See* Ark. Code Ann. §§ 16-112-201 to -203 (Supp. 2003). In particular, section 16-112-202(c)(1) provided that testing be preformed if:

(A) A prima facie case has been established under subsection (b) of this section;

(B) The testing has the scientific potential to produce new noncumulative evidence materially relevant to the defendant's assertion of actual innocence; and
(C) The testing requested employs a scientific method generally accepted within the relevant scientific community.

Appellant failed to prove a *prima facie* case under section 16-112-202(c)(1)(B) to show that the testing would produce evidence materially relevant to his assertion of actual innocence. Because he failed to state sufficient facts in his petition in order for retesting to be granted under Act 1780, the denial of his petition is affirmed. This order precludes appellant from filing another Act 1780 petition on the facts presented herein.

Affirmed.